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No. 05-5224

IN THE
Supreme Court of the United States

ADRIAN MARTELL DAVIS,
Petitioner,

v.

WASHINGTON,
Respondent.

On Writ of Certiorari
to the Supreme Court of Washington

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether an alleged victim's statements to a 911 operator naming her assailant – admitted as "excited utterances" under a jurisdiction's hearsay law – constitute "testimonial" statements subject to the Confrontation Clause restrictions enunciated in *Crawford v. Washington*, 541 U.S. 36 (2004).

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at 154 Wn.2d 291, 111 P.3d 844 (2005), and appears at J.A. 116-138. The opinion of the Washington Court of Appeals is published at 116 Wn. App. 81, 64 P.3d 661 (2003), and appears at J.A. 96-111. The relevant orders of the trial court are unpublished and appear at J.A. 34-68.

STATEMENT OF JURISDICTION

The Washington Supreme Court issued its opinion on May 12, 2005, and amended it on May 31, 2005. J.A. 116. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Washington Rule of Evidence 803(a) provides in relevant part: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (2) *Excited Utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

STATEMENT OF THE CASE

This case presents an example of a recent practice that prosecutors call "victimless" prosecutions. The hallmark of such cases is not that they lack a victim, but rather that they lack any in-court testimony from a victim. Prosecutors seek to

prove the defendant's guilt principally by means of *out-of-court* accusations – typically, reports people make right after alleged crimes to police or other personnel associated with law enforcement. *See generally* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1173-80 (2002).

Prosecutions were "rarely if ever" conducted on this basis before the mid-1990's. *Id.* at 1223. But after this Court held in *Ohio v. Roberts*, 448 U.S. 56 (1980), that the Sixth Amendment's Confrontation Clause required only that judges deem out-of-court accusations "reliable," prosecutors came to realize that the *Roberts* framework allowed them to satisfy constitutional demands simply by introducing out-of-court accusations under their local hearsay law as "excited utterances." *See, e.g., White v. Illinois*, 502 U.S. 346 (1992) (making clear that excited utterances were automatically admissible under *Roberts* framework regardless of declarant's unavailability); Andrew King-Reis, Crawford v. Washington: *The End of Victimless Prosecution?*, 28 Seattle L. Rev. 301, 309 (2005) (authored by former Washington prosecutor). There was no need to ask alleged victims ever to appear in court.

In *Crawford v. Washington*, 541 U.S. 36 (2004), however, this Court abrogated the *Roberts* framework, restoring the Confrontation Clause to its traditional mode of operation. Now, once again, the Clause imposes a categorical procedural requirement that prosecutors make the declarants of any incriminating "testimonial" statements available for cross-examination.

The question this case presents is how *Crawford* applies to a "victimless" prosecution based almost exclusively on statements reporting a crime to a 911 operator. Although the prosecutor characterized this report to the jury as the alleged victim's "testimony" on the day she was assaulted, J.A. 81, and

used the report for exactly that purpose at trial, a majority of the Washington Supreme Court held that the alleged victim's answers to the 911 operator's questions were "nontestimonial" and properly admitted.

1. The City of Kent, Washington, like other political subdivisions in the United States, maintains a 911 telephone system. Dialing 911 connects a caller with an operator "associated with the police," J.A. 124, and allows the caller to request emergency assistance or to register less urgent complaints. The City's website advises its citizens: "If you need to see a police officer, want to report a crime, or observe suspicious activity, call 9-1-1. Even if it is not an 'emergency.'" City of Kent, Washington, *Dial 9-1-1 for Emergencies*, <http://www.ci.kent.wa.us/emergency/ 911.asp> (last visited Dec. 21, 2005).

911 operators in Kent, as elsewhere, are trained to gather information from callers and to coordinate quick responses. In order to maintain "a uniform method of interviewing callers requesting police assistance," Policy 602 of the Standard Operating Procedures for Kent's 911 system supplies detailed guidelines "to be used during the interview of a reporting party" during a "police incident interview." J.A. 112-13; *see also* J.A. 135 n.5 (Sanders, J., dissenting) (discussing this Policy). It instructs: "On all police related calls, the call taker shall obtain pertinent information, such as where the incident occurred, what type of incident occurred, when the incident occurred, if weapons were involved, who was involved, why it occurred and the reporting party's information." J.A. 112. The Policy then outlines several suggested questions for obtaining this information. J.A. 113-16. Because "[a]n officer may arrest a subject on information given to him by a [911 operator]," the Standard Operating Procedures direct operators to "[q]uestion aggressively" and to "[b]e tenacious in obtaining information from reporting parties." Standard Operating Procedures, Section 4, at 29.

While people call 911 to report all sorts of crimes, the State of Washington, like other states, especially encourages people to use 911 systems to report incidents of domestic violence and, particularly, violations of protection orders. The Washington state courts' website, for example, contains a series of webpages dedicated exclusively to domestic violence. A webpage concerning protection orders advises: "When you believe a violation of the terms of the protection order has occurred, you should call 911 or your local police to request an officer for any needed emergency assistance and to take a report of the violation." Washington Courts, *Domestic Violence Protection Order Process, Violation of Protection Orders, What You Should Do If the Order is Violated*, <http://www.courts.wa.gov/dv/?fa=dv_order.ordviol> (last visited Dec. 21, 2005). The webpage explains that violating a restraint from causing or threatening harm is a crime – "up to a Class C felony" – and that committing domestic violence "subjects the Respondent to a MANDATORY ARREST." *Id.*; *see also City of Tacoma v. State*, 117 Wn.2d 348, 352 (1991) (describing Washington's mandatory arrest laws).[1] Washington police departments and other local governmental entities also publicize their 911 systems to potential domestic-violence complainants and instruct that such reports will trigger mandatory arrests and other kinds of police enforcement.[2]

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[1] Washington's mandatory arrest laws are typical. *See* Friedman & McCormack, 150 U. Pa. L. Rev. at 1184-85 (surveying laws in other states and municipalities).

[2] For example, the website for King County, where this case arises, contains a webpage dealing exclusively with domestic violence and providing information regarding applicable legal procedures. *See* King County, *If You Think You Are or Might Be a Victim of Domestic Violence*, <http://www.metrokc.gov/dvinfo/dv1_0.htm> (last visited Dec. 21, 2005) ("If the police believe they have probable cause to suspect that a person assaulted you within the previous four-hour period, they are required to arrest the person who committed the assault. That is the law."); King

2. Just before noon on February, 1, 2001, Michelle McCottry, a resident of Kent, called 911 to report that her ex-boyfriend had violated her protection order against him. A 911 operator answered, but McCottry hung up before saying anything. The operator called McCottry right back and asked her what was going on. McCottry, who sounded "hysterical and crying," explained that a man who "had left the residence moments earlier" had beat her with his fists. J.A. 117. After the operator told McCottry she had "help started" (presumably meaning that police were on the way) the operator urged McCottry to "[l]isten to me carefully," J.A. 9, and then commenced a series of questions that "followed [Policy 602] almost exactly." J.A. 135 n.5 (Sanders, J., dissenting). This part of the call began with the following exchange:

911 Operator:	. . . Do you know his last name?
Complainant:	It's Davis.
911 Operator:	Davis? Okay, What's his first name?
Complainant:	Adran.
911 Operator:	What is it?
Complainant:	Adrian.
911 Operator:	Adrian.
Complainant:	Yeah.
911 Operator:	Okay. What's his middle initial?
Complainant:	Martell. . . .

J.A. 9. Later in the interview, which lasted about four minutes, McCottry described the circumstances that allegedly gave rise to the assault, provided the operator Davis' birthdate, and answered questions concerning the protection order against him. J.A. 10, 12. McCottry also informed the operator that the

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County, *Information About the Law Against Domestic Violence and About Courts and the Protection Order Process*, <http://www.metrokc.gov/dvinfo/dv6_0.htm> (last visited Dec. 21, 2005) ("Once you have a valid Order for Protection, if it is violated, you should call 9-1-1 and ask the police to help you by enforcing it.").

police had been at her house two days earlier for another domestic disturbance between her and Davis. J.A. 21, 118 n.1.[3]

At one point during the call, McCottry told the operator that another man also had just been in her house – a man she later told the police was named "Mike" – but the operator never asked any follow-up questions about him. J.A. 10; *see also* J.A. 136 n.7 (Sanders, J., dissenting). At another point, the operator asked McCottry whether she needed an "aid car." McCottry answered, "No, I'm all right." J.A. 10.

Two police officers arrived at McCottry's house minutes after the 911 call ended. "They noted that McCottry was still very upset and had what appeared to be fresh injuries on her forearm and her face." J.A. 117. The officers immediately began documenting the particulars of McCottry's complaint, asking her questions regarding the incident and tape recording her responses. Report of Proceedings (Sept. 4, 2001) at 37. McCottry told the officers that she had gotten involved in a verbal argument with Mike and that Davis had physically assaulted her. J.A. 136 n.7 (Sanders, J., dissenting). The police later arrested Davis. They never obtained Mike's full name or tried to seek him out in connection with the case. *Id.*; *see also* Report of Proceedings (Sept. 4, 2001), at 18, 23-24.

3. The State charged Davis with one count of violating a domestic order of protection, Wash. Rev. Code § 26.50.110(1) & (4), a charge that the State elevated to a felony by including a special allegation that Davis assaulted McCottry. J.A. 6-7, 130.

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[3] The two passages from the call in which McCottry tells the operator that the police were at her house two days ago were redacted for trial on the ground that their prejudicial effect outweighed their probative value. J.A. 118 n.1. The trial court, of course, had access to the entire 911 call to make its Confrontation Clause and hearsay rulings. J.A. 21, 34.

During pretrial hearings, the prosecutor acknowledged to the court that McCottry had told her that "she wasn't happy that we were proceeding with this case." Report of Proceedings (Aug. 29, 2001), at 44. And on the eve of trial, McCottry failed to appear for her pretrial interview with defense counsel. But the State advised the court that it intended to press on anyway and that it expected to be able to produce McCottry for trial. J.A. 18.

On the morning of trial, the State told the court that McCottry would not, in fact, be coming to testify at trial. Upon learning this, Davis' attorney complained that "the State has chosen not to compel her to come to Court to tell the jury in person what occurred," thereby depriving the defense of its ability "to cross-examine her." J.A. 41, 43. Davis' attorney later made a formal motion to that effect, arguing that "because Mr. Davis cannot confront his accuser he's denied his constitutional rights" under the Sixth Amendment's Confrontation Clause. J.A. 41, 43. Although the State previously had acknowledged that this case "comes down to credibility issues between . . . the complaining victim and the defendant," Report of Proceedings (Sept. 4, 2001), at 44, it took the position that "the confrontation clause is not violated if the information that is allowed into the record" from a nontestifying victim "falls under the excited utterance rule, which is what we have here." J.A. 60; *see also* J.A. 43.

The trial court sided with the State. Although the court excluded McCottry's later statements to the officers, J.A. 34-40, it ruled that all of McCottry's answers to the 911 operator's questions constituted excited utterances. J.A. 34. And because the statements were excited utterances, they automatically were admissible under the *Roberts* framework for assessing Confrontation Clause objections, "even if the declarant is available as a witness but does not testify." J.A. 65 (citing *White v. Illinois*, 502 U.S. 346 (1992)).

During the trial, the State presented testimony from only two live witnesses, the two police officers who had responded to McCottry's call. The prosecutor also played the 911 tape. Davis' attorney argued in closing that there was insufficient evidence to convict. She emphasized that the State had not presented any eyewitnesses to the alleged assault, and that the only evidence suggesting Davis was ever even in McCottry's house on the day at issue – McCottry's statements during the 911 call – had not been given in the presence of the jury, under oath, or even subject to cross-examination. J.A. 75-76.

The prosecutor offered the following rebuttal:

> [Davis' attorney] would like you to believe that . . . no one you heard from saw this crime. That is not true. You have the voice of Ms. McCottry on that 911 tape. She reported it right when it happened.
>
> . . . .
>
> And if you really, truly want to think about this, as you must, just consider that there was a person present and that person is Ms. McCottry and although she is not here today to talk to you she left you something better. *She left you her testimony on the day that this happened,* February 1st, 2001, this shows that the defendant, Adrian Davis was at her home and assaulted her. *It is right here in her voice.*

J.A. 80-81 (emphasis added). The prosecutor then played the 911 tape again, quickly summarized how this "testimony" established the elements of the crime charged, and rested her case. J.A. 81-82.

The jury returned a guilty verdict, and the court sentenced Davis to 15 months in prison, a sentence within Washington's "standard range" for this crime. J.A. 85, 88.

4. The Washington Court of Appeals affirmed Davis' conviction. As is relevant here, the Court of Appeals held that the trial court properly classified all of McCottry's answers to the 911 operator's questions as excited utterances. J.A. 98. It also agreed with the trial court that the State's use of the 911 tape satisfied the *Roberts* framework. J.A. 97-101. The *Roberts* framework provided that any out-of-court statements falling within a "firmly rooted" hearsay exception were sufficiently reliable to be offered against the accused, and that the excited utterance exception was a firmly rooted one. J.A. 98.

5. The Washington Supreme Court granted Davis' petition for discretionary review. While the case was pending, this Court abandoned the *Roberts* framework and held in *Crawford v. Washington*, 541 U.S. 36 (2004), that the Confrontation Clause bars the use of "testimonial" hearsay against criminal defendants unless the declarants are unavailable and the defendants had a prior opportunity to cross-examine them. The Washington Supreme Court received supplemental briefing and held a second oral argument concerning whether the State's use of the 911 call contravened *Crawford*.

The Washington Supreme Court held, by an 8-1 vote, that "the information essential to the prosecution of this case was McCottry's initial identification of Davis as her assailant" and that that identification was "nontestimonial and properly admitted." J.A. 128-29. The majority discussed a California appellate decision saying it was doubtful whether there could exist "any circumstances under which a statement qualifying as an excited utterance would be testimonial." J.A. 125 (citing *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. App. 2004)).

Without resolving this doubt, the majority asserted that a 911 call "must be scrutinized to determine whether it is a call for help to be rescued from peril or is generated by a desire to bear witness." J.A. 124. Apparently positing that every 911 call could neatly be characterized as one or the other, the majority concluded that McCottry's identification of Davis was nontestimonial because "there is no evidence that McCottry sought to 'bear witness' in contemplation of legal proceedings." J.A. 128.

Justice Sanders dissented. He found it irrelevant that McCottry's responses to the 911 operator's questions qualified as excited utterances. J.A. 137. In addition, the dissent rejected the majority's test requiring an inquiry into the subjective intent of 911 callers. It read *Crawford* to "dictate[] an objective standard," focusing on "whether the statement fulfills the function of prosecution testimony." J.A. 134 (quotation omitted). The dissent found it "clear that the 911 call in this case fulfilled th[at] function." *Id.* "[A] reasonable person today who calls 911 in connection with a criminal act could anticipate that his or her statement would be used in investigating and prosecuting a crime." J.A. 133. Finally, the dissent noted that even though some people may call 911 and ask to be rescued from peril, McCottry never "ask[ed] for help," so "[t]his [case does not present] the amplified 'call for help' that most courts and commentators have identified as potentially 'nontestimonial.'" J.A. 136.

SUMMARY OF ARGUMENT

McCottry's answers to the 911 operator's questions accusing Davis of having just assaulted her were "testimonial" and should have been excluded from trial.

I. The right to confrontation, as originally understood, prohibited prosecutions based on nontestifying witnesses' accusations to governmental agents that someone committed a

crime – no matter how "excited" declarants were at the time or how contemporaneously their accusations were made with the alleged transgression.

A. From its earliest origins over two thousand years ago, the core of the right to confrontation has consisted of a guarantee that the accused shall be confronted with his "accuser." The early Romans used that nomenclature; English common law authorities characterized the right that way; and this Court consistently has done the same. It thus is plain that the Framers, if nothing else, meant to constitutionalize this elementary prohibition against using out-of-court accusations to convict criminal defendants.

B. The traditional confrontation rule governing accusatory statements to governmental agents did not exempt accusations made right after the acts allegedly occurred or otherwise made under the stress of excitement. People during the Founding era had opportunities – and often a duty – to report felonious acts to local constables and bailiffs as soon as they occurred. Like 911 calls today, these reports – commonly called "hues and cries" – typically served the dual purpose of seeking help and initiating the workings of law enforcement. Yet these reports were inadmissible in criminal trials because they were not given under oath or subject to cross-examination. Indeed, if anything, contemporaneous authorities viewed these fresh reports as *less* acceptable substitutes for live testimony than other, more formal kinds of *ex parte* examinations.

C. The nascent hearsay rule during the Founding era (and for a considerable period thereafter) respected and reinforced the confrontation rule that, if witnesses did not testify at trial, their statements reporting criminal acts were inadmissible for the truth of the matter asserted. There was no such thing as an "excited utterance" exception in 1791. Instead, prevailing authorities distinguished between statements that were part of the *res gestae* – that is, the incident

itself – from statements that described completed acts. And deep into the 19th century, courts in criminal cases rigorously excluded the latter from evidence, prohibiting prosecutors from introducing victims' declarations identifying who had just shot, stabbed, or otherwise harmed them. It did not matter whether a declarant also had asked for help; whether a declarant had been trying to assist in apprehending the offender; or whether the statement was made so contemporaneously with the incident and under such mental conditions as practically to guarantee its truth. If the victims did not testify at trial, the absence of an oath and the defendants' inability to cross-examine their accusers precluded admitting the out-of-court declarations to prove the defendants' guilt.

Hearsay law, especially during the era of *Ohio v. Roberts,* 448 U.S. 56 (1980), eventually drifted away from this strict *res gestae* rule, to the point where some states, such as Washington, now regularly allow the admission of statements describing past criminal acts under the "excited utterance" exception. But current evidence law blesses such statements because of their perceived reliability. While this consideration is perfectly legitimate in some contexts, it is "fundamentally at odds with the right to confrontation," *Crawford v. Washington,* 541 U.S. 36, 61 (2004), and thus the Framers would not have accepted it as a justification for admitting nontestifying witnesses' testimonial statements against defendants in criminal cases.

II. There is no reason in the modern context of 911 calls to depart from the traditional categorical rule that statements, as here, reporting crimes to governmental agents are testimonial.

A. The practice of trying defendants based on accusations a person makes in response to a 911 operator's questions is antithetical to the adversarial process that *Crawford*'s testimonial principle is designed to protect.

Operators conduct what they call "police incident interviews" according to a detailed script, designed in large measure to elicit information for use in apprehending and prosecuting offenders. And callers, particularly those reporting domestic violence, are amply aware that law enforcement may use their accusations in this way. Whatever the outer boundaries of the testimonial principle may be, this type of governmentally generated dialogue is more than sufficient to trigger confrontation concerns. To hold otherwise would be to say that the government may establish a system for reporting crimes to the police and for conducting *ex parte* interviews of complainants, and then use recordings of those interviews as a substitute for live testimony at trial. It is hard to imagine a proposition that would have more offended the Framers of the Sixth Amendment.

B. That some people call 911 at least in part to seek help does not render any of McCottry's statements in this case nontestimonial. The relevant question – to the extent constitutional text and historical inferences do not resolve whether a type of statement is testimonial – should not be *why* someone makes certain statements to a governmental agent, but whether declarants *reasonably would have anticipated* that their statements might be used for law enforcement purposes. That standard is satisfied here.

To be sure, the simple fact that a person called 911 and asked for help may be admissible in criminal cases. But McCottry never asked for help, and the prosecutor never used McCottry's statements to suggest she did. Rather, the prosecutor introduced the 911 call as the principal evidence of Davis' guilt and told the jury that it constituted "her testimony on the day that this happened, . . . show[ing] that the defendant, Adrian Davis was at her home and assaulted her." J.A. 81. This common-sense characterization of the recording the prosecutor then played confirms what should have been obvious to the Washington Supreme Court: that McCottry's

answers to the 911 operator's questions were testimonial and improperly admitted at trial.

ARGUMENT

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that "testimonial" statements may not be introduced at trial against criminal defendants unless the declarants are unavailable and the defendants had an opportunity to cross-examine them. It is undisputed that those conditions were not satisfied here. This case turns, therefore, on whether Michelle McCottry's 911 declarations in which she accused Davis of violating the protection order and assaulting her were testimonial. The text, history, structure, and purpose of the Confrontation Clause confirm that they were, and that the Washington Supreme Court erred in holding to the contrary.

I. The Right To Confrontation, As Originally Understood, Prohibited Prosecutions Based On Non-testifying Witnesses' Accusations To Governmental Agents That Someone Had Just Committed A Crime.

The Sixth Amendment guarantees to the accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. This Court in *Crawford* held that a person acts as a "witness against" another when he or she makes "testimonial" statements. Although this Court in *Crawford* declined to adopt a "comprehensive" definition of the term "testimonial," 541 U.S. at 68, it established that the starting point for assessing whether any particular statement is testimonial is to determine whether the right to confrontation, as originally understood, applied to that type of statement. *Id.* at 42-53. When, as here, the statement at issue arises in the context of "a phenomenon that did not exist at the time of [the Sixth Amendment's] adoption" – in this case, a 911 system – the task is to "estimat[e] as accurate[ly] as possible" how the Framers would

have applied the constitutional right to that situation. *Id.* at 52 n.3.

Despite the clarity of these instructions in *Crawford,* the Washington Supreme Court never paused to consider whether the Framers would have considered reporting a crime to a governmental agent right after it allegedly happened to implicate the Confrontation Clause. This was a serious error, for a review of pertinent historical sources demonstrates that the Framers would have understood the right to confrontation to apply to such accusatory statements.

A. Accusatory Statements Always Have Rested At The Heart Of The Right To Confrontation.

"The right to confront one's accusers is a concept that dates back to Roman times." *Crawford,* 541 U.S. at 43. And from its earliest days, the right to confrontation has been understood (as that passage from *Crawford* suggests) to apply with special solicitude to out-of-court statements that are *accusatory* in nature. The right, at its core, prohibits criminal prosecutions based on out-of-court accusations.

The Bible twice refers to the right to confrontation, and both times it characterizes it as the right to confront one's "accuser." Most famously, the Book of Acts recites that "[t]he Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: 'It is not the manner of the Romans to deliver any man up to die before the accused has met *his accusers* face to face, and has been given a chance to defend himself against the charges.'" Book of Acts 25:16 (emphasis added), *quoted in Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988).

In addition, a popular mid-18th century manual for English justices of the peace cited the New Testament's "cast the first stone" parable for the proposition that "no man is to be condemned without an *Accuser*." *See* Michael Dalton, The Country Justice 379 (1746) (emphasis added). In the parable,

the Scribes and Pharisees brought a woman before Jesus, told him that she had been caught in the act of adultery, and asked how she should be punished. After Jesus challenged "him that is among you without sinne" to cast the first stone, the accusers slunk away, and Jesus let the woman go. John 8:7. As commentators later have explained, the 18th century manual "makes sense only if 'accuser' means someone willing to face the accused and make the accusation; it is obvious from the Biblical passage that there were in fact accusers, but they had refused to confront the accused when it became apparent that this would require them to open their own character to impeachment." Charles Allen Wright & Kenneth W. Graham, Federal Practice and Procedure: Evidence § 6342, at 241-422 & n.403 (1997).

This traditional understanding of the right to confrontation as a right, at its core, to confront one's "accuser" was carried forward through the centuries. *See generally* Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause,* 34 Va. J. Int'l L. 481 (1994). When the notorious English treason trials of the 16th and 17th centuries strayed from strictly respecting the right, *see Crawford,* 541 U.S. at 43-45, the defendants complained that the prosecutions denied them the opportunity to confront their "accusers." For instance, Sir Walter Raleigh – whose trial in 1603 the Framers thought was "a paradigmatic confrontation violation," *id.* at 52 – repeatedly demanded to "let my *accuser* come face to face and be deposed[.]" *Trial of Sir Walter Raleigh*, 1 Jardine's Criminal Trials 389, 427 (1832) (emphasis added); *see also id.* at 418 ("But, my Lords, I claim to have my *accuser* brought here face to face to speak.") (emphasis added); *id.* at 420 ("[I]f [Lord Cobham] will then maintain his *accusation* to my face, I will confess myself guilty.") (emphasis added). After England reformed its law during the 17th and 18th centuries to prevent such abuses, it became firmly established at common law that an "accuser" was thought of as "a witness who instigated the

prosecution, and his direct and open participation in the case was indispensable." Leonard W. Levy, Origins of the Fifth Amendment 29 (1968); *see generally Crawford,* 541 U.S. at 44-47.

"Historically," therefore, "the inclusion of the Confrontation Clause in the Bill of Rights reflected the Framers' conviction that the defendant must not be denied the opportunity to challenge *his accusers* in a direct encounter before the trier of fact." *Ohio v. Roberts,* 448 U.S. 56, 78 (Brennan, J., dissenting) (emphasis added). And even well into the latter part of the 20th century, this Court reaffirmed that the Confrontation Clause was meant to ensure that "the accused and *the accuser* engage in an open and even contest in a public trial." *Lee v. Illinois,* 476 U.S. 530, 540 (1986) (emphasis added); *see also California v. Green,* 399 U.S. 149, 179 (1970) (Harlan, J., concurring) ("[T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, *trials by anonymous accusers, and absentee witnesses*") (emphasis added); *Bruton v. United States,* 391 U.S. 123, 138 (1968) (Stewart, J., concurring) (*"[A]n out-of-court accusation* is universally conceded to be constitutionally inadmissible against the accused.") (emphasis added).

The Sixth Amendment, in other words, "constitutionalize[d] the right in an adversary criminal trial to make a defense as we know it." *Faretta v. California,* 422 U.S. 806, 818 (1975). And the Framers understood the right to cross-examine one's accuser as absolutely central to such an adversary process. *Id.*; *see also White v. Illinois,* 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment) (describing the Confrontation Clause's emphasis on "the adversary process"); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternate History,* 27 Rutgers L.J. 77, 168 (1995) (same). "If [under *Crawford*] we are to imagine the Framers' reaction to practices that did not exist at the time, we could imagine few practices that would

have been more abhorrent to their values" than modern-day victimless prosecutions based on "out-of-court accusations." Robert P. Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses,* 39 U. Rich. L. Rev. 511, 607 n.548 (2005).

B. During The Period Surrounding The Founding, Accusatory Statements Triggered The Right To Confrontation Even When Made While Still Under The Excitement Of The Alleged Event.

Neither 911 systems nor professional police forces existed in 1791. Nevertheless, victims of alleged crimes during that period had opportunities – and often an obligation – immediately to report felonious acts to local constables or bailiffs. 2 Sir Matthew Hale, Historia Placitorum Coronae: A History of the Pleas of the Crown 98-100 (1st Am. ed. 1847). Such an oral report was commonly called a "hue and cry." *Id.* These prompt reports, like reports to authorities in modern times, were taken very seriously: it was a crime in itself to give "false information" to a constable. 2 Hale, *supra*, at 101; *compare* Wash. Rev. Code § 9A.84.040 (false reports to police unlawful); *State v. Hopkins,* 117 P.3d 377, 384 (Wash. App. 2005) (Quinn-Brintnall, C.J., dissenting) (noting that false report statutes apply to 911 calls).

A hue and cry, also like a 911 call today, typically served a dual function of assisting in apprehending a potentially dangerous suspect and triggering a prospective criminal prosecution. As Sir Matthew Hale explained the situation in common law England:

> 1. The party that levies [the hue and cry] ought to come to the constable of the vill[age], and give him notice of a felony committed, and give him such reasonable assurance thereof as the nature of the case will bear. 2. If he knows the name of him that

> did it, he must tell the constable the same. 3. If he knows it not, but can describe him, he must describe his person, or his habit, or his horse, or such circumstances that he knows, which may conduce to his discovery.

2 Hale, *supra*, at 100; *see also* 2 *id.* at 100 n.(c) (citing other sources in accord); 4 William Blackstone, Commentaries on the Laws of England 294 (1768) ("The party raising [a hue and cry] must acquaint the constable of the vill[age] with all the circumstances which he knows of the felony and the person of the felon."). Constables, in turn, were required to use this information to orchestrate pursuits and arrests of suspects, and sometimes to initiate investigations. 2 Hale, Pleas of the Crown, at 99-100; 4 Blackstone, Commentaries, at 294; *see also* 1 James Stephen, A History of the Criminal Law of England 224 (1883) (recounting case in which a murder victim's butler "fetch[ed]" the local magistrate "just as he was going to bed" to bring him to the crime scene); The Proceedings of the Old Bailey, London 1674 to 1834, *Henrietta Radbourne*, t17870711-1, at 11 (July 11, 1787), <http://www.oldbaileyonline.org/html_units/1780s/t17870711-1.html> (last visited Dec. 19, 2005) (constable's trial testimony describing his preliminary investigation of crime scene).[4]

There can be little doubt that the substance of hues and cries would have been persuasive evidence in criminal prosecutions – and sometimes critical evidence when declarants became unavailable to testify. Yet hues and cries were accusatory statements, made without placing the declarant under oath, conducting thorough examinations, or giving the accused an opportunity to cross-examine. 2 Hale, *supra*, at 101. Accordingly, while people were supposed to give such

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[4] The page references in this brief for the "Old Bailey" proceedings track the pagination that results when the electronic webpages are printed out. The website does not contain official pagination to the original reports.

oral reports and constables were supposed to act on them, neither the English common law nor early American courts allowed any exception to the right to confrontation for using in criminal trials these "fresh" – and often excited – reports in place of the declarant's live testimony subject to cross-examination.

One widely circulated treatise, for example, noted that a constable "could not be asked [at trial] what name [an alleged victim] mentioned" when a robbery victim reported the crime to him. Henry Roscoe, A Digest of the Law of Evidence in Criminal Cases 23 (3rd Am. ed. 1846) (describing *Rex v. Wink*, 172 Eng. Rep. 1293 (1834)). Indeed, it appears that hue and cry reports were not even thought to be a sufficient basis to impose *pretrial* restraints on a suspect's liberty. In order to justify detaining a suspect in prison pending trial, the Marian bail and committal statutes required accusers to give statements under oath and subject to magistrates' questioning. *See Crawford*, 541 U.S. at 44; *Directions to Justices of the Peace*, 84 Eng. Rep. 1055 (1708). When accusers later became unavailable for trial, prosecutors sometimes tried to introduce these examinations (though by the time of the Founding era, such examinations were admissible only if the defendant had been afforded the opportunity to cross-examine). *See Crawford*, 541 U.S. at 46-47. But, aside from the *Wink* case, there does not appear to be any record of a prosecutor even seeking to admit, in place of an accuser's live testimony, an accuser's original hue and cry to a constable or other governmental agent.

Even when a fresh accusation to a governmental agent was not, strictly speaking, a hue and cry, courts precluded its use at trial in the absence of an opportunity for the defendant to confront the declarant. One English trial that occurred almost precisely contemporaneously with the Founding illustrates the point. In *Rex v. Radbourne*, 1 Leach 457 (1787), a constable learned that a woman had been injured and was bleeding

profusely, and he went to her bedroom "to go in to see." *Radbourne, supra,* t17870711-1, at 11. The woman died about three weeks later, and her maid was charged with stabbing and killing her. When the constable testified at trial, he said that, upon entering the room, "I laid myself as close as I could to speak to her" and then "spoke to the lady." *Id.* But before the constable could say anything else, the court interrupted him and noted "[w]e cannot ask you what passed between you and the lady when the prisoner was not there." *Id.* Lest there be any doubt that this ruling rested on confrontation grounds, the court later allowed into evidence a magistrate's deposition of the victim, taken several days after the incident, because the magistrate had placed the victim under oath and conducted his examination "in the presence of the prisoner." *Radbourne,* 1 Leach at 461.

The upshot of this history is that the Framers, following their English forebearers, understood the Confrontation Clause as making a "procedural" choice about how the reliability of evidence "can best be determined" – namely, by cross-examination. *Crawford,* 541 U.S. at 61 (citing 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . . . is much more conducive to clearing up the truth."); Sir Matthew Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better")). That being so, using alleged victims' fresh reports in place of live testimony at criminal trials was improper in just the same way as was using more formalized *ex parte* examinations of absent witnesses. South Carolina's highest law court explained shortly after the Bill of Rights was adopted that:

> Charges for criminal offences are most generally made by the party injured, and *under the influence of the excitement incident to the wrong done*, and however much inclined the witness may be to speak the truth, and the magistrate to do his duty in taking

> the examination, his evidence will receive a coloring in proportion to the degree of excitement under which he labors, which the judgement [sic] may detect, but which it is impossible exactly to describe, and we know too how necessary a cross examination is to elicit the whole truth from even a willing witness; and to admit such evidence without the means of applying the ordinary tests, would put in jeopardy the dearest interests of the community.

State v. Hill, 20 S.C.L. 207, 1835 WL 1416, at *2 (App. L. 1835) (emphasis added). Declarants' "excitement" as a result of alleged injuries, in short, in no way exempted their statements reporting crimes to governmental agents from confrontation restrictions. If anything, such excitement was seen as heightening the need for cross-examination.

C. The Hearsay Rule During This Period (And Long Thereafter) Respected The Confrontation Rule That Any Statement Reporting Criminal Conduct Was Inadmissible To Prove The Truth Of The Matter Asserted.

Crawford advised that the operation of the hearsay rule when the Sixth Amendment was adopted also sheds light on the original understanding of the Confrontation Clause. *See* 541 U.S. at 55-56. This is because it is safe to assume that courts at that time would not have countenanced a hearsay exception that permitted testimonial evidence to be introduced in criminal cases. *See id.* at 56.

To this end, *Crawford* also noted that "to the extent the hearsay exception for spontaneous declarations existed at all [in 1791], it required that the statements be made 'immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.'" *Id.* at 58 n.8 (quoting *Thompson v. Trevanion*, Skin. 402, 90

Eng. Rep. 179 (K.B. 1694)). A thorough examination of common-law sources demonstrates that this suggestion is generally correct; if anything, it makes the rule respecting "spontaneous" statements in criminal cases sound more lenient than it was. The rule around the time of the Founding provided that a spontaneous declaration might be admissible in a criminal case if it was part of the *res gestae* – that is, an inseparable part of the event itself. But, save "[t]he one deviation" of dying declarations, *Crawford*, 541 U.S. at 55 n.6, statements describing completed criminal acts – *even to private parties* – were considered inadmissible hearsay if the declarant did not testify at trial. Furthermore, this rule against admitting statements reporting crimes remained firm for decades after the Sixth Amendment was enacted. It thus powerfully suggests that American lawyers and courts originally conceived the right to confrontation as precluding the admission of such accusatory evidence as a substitute for live trial testimony in an adversarial setting. *See, e.g., Printz v. United States*, 521 U.S. 898, 905 (1997) (government's failure to use a "highly attractive" practice for years following the Founding gives "reason to believe" the practice was considered unconstitutional).

1. Prior to the Founding, not a single criminal procedure or evidence treatise suggested that out-of-court statements describing criminal conduct were admissible, no matter how contemporaneously made with the event described. *See, e.g.*, Thomas Peake, A Compendium on the Law of Evidence 8 (1801) (listing hearsay exceptions and not mentioning anything related to spontaneous declarations). In the early 19th century, however, English and American treatises began to divide statements that were "part of the *res gestae*," in which a statement "is itself a fact," from those that were "mere oral assertion[s]." 3 William Blackstone, Commentaries on the Laws of England 368 n.25 (J. Chitty ed. 1826); *see also* 2 Joseph Gabbett, A Treatise on Criminal Law 468 (1843) (statement admissible if it was "itself a part of the transaction" but not if it is offered to prove "a *distinct* fact"). As another

treatise put it: contemporaneous declarations "respecting the motives or objects he had in view of doing" the act were admissible, but assertions "made prior or subsequent to the doing the acts" were not. Eustachius Strickland, A Treatise on Evidence 397 (1830).

Well into the 19th century, courts rigorously enforced the requirement that a statement was admissible only if it was part of, rather than a description of, an event. In a typical case, a man was shot in his home. A few minutes later, family members and friends responded to help him. He told them to "[g]o for a doctor," and then, in response to someone's question, identified the shooter. The Indiana Supreme Court held that the latter statements constituted "no part of the *res gestae*, and were not admissible as such," explaining:

> It can not, with any propriety, be said, that the statements made by the deceased, after the crime had been fully completed, that Prince Jones shot him, served in any degree to illustrate the character of the main fact, the shooting. They were the simple statements of the deceased, narrative of what had already transpired, and important only as indicating the person by whom the main fact had been perpetrated.
>
> . . . .
>
> We attach no special significance to the fact that the declarations were made, not contemporaneously with, but a few minutes after, the shooting, further than that it shows, in connection with the substance of the statements, that they were purely narrative of what had already transpired.

Jones v. State, 71 Ind. 66, 82-83 (1880). A statement, in sum, saying, "Prince Jones, don't shoot me!" may have been

admissible, but telling a third party that "Prince Jones just shot me" was not.

Numerous other homicide and similar cases reached analogous results, making clear that it was irrelevant whether an accusatory statement "was made so soon after the occurrence as to exclude the presumption that it has been fabricated" or whether "it was made under such circumstances as to compel the conviction of its truth." *Mayes v. State,* 1 So. 733, 735 (Miss. 1877); *see also, e.g., State v. Carlton,* 48 Vt. 636, 643 (1876) (irrelevant whether statement was made "so soon after that the party had not time, probably, to imagine or concoct a false account"). Nor did it matter whether a victim's statement was made moments after an incident "with a view to the apprehension of the offender." *People v. Ah Lee,* 60 Cal. 85, 92 (1882); *see also, e.g., State v. Davidson,* 30 Vt. 377 (1858) (statement suggesting need to pursue suspect inadmissible). If a victim's statement identified the perpetrator of a "completed" criminal act, the statement, "however nearly contemporaneous with the occurrence," fell outside the *res gestae* and was strictly inadmissible. *Davidson,* 30 Vt. at 384-85 (robbery victim's statement identifying perpetrator "directly after" attack inadmissible); *see also Mayes,* 1 So. at 735-36 (victim's statement identifying assailant right after being stabbed); *State v. Pomeroy,* 25 Kan. 349, 350-51 (1881) (statement three to five minutes after assault identifying attacker to persons who responded to his cry for help); *Ah Lee,* 60 Cal. at 89-91 (stabbing victim's statement minutes after event identifying attacker); *Kraner v. State,* 61 Miss. 158, 161 (1883) (bleeding victim's statement five minutes after stabbing and after "the accused had withdrawn from the scene"); *State v. Estoup,* 39 La. Ann. 219, 221 (La. 1887) (shooting victim's statement "a few minutes after receiving the wound").

Only one state court prior to the late 19th century issued a contrary decision, allowing the admission of a deceased victim's statement shortly after being stabbed as part of the *res*

gestae. *See Commonwealth v. McPike*, 3 Cush. 181 (Mass. 1849); *see also Commonwealth v. Hackett*, 2 Allen 136 (Mass. 1861) (applying *McPike* to another such case). But the ruling was roundly criticized as without legal or logical foundation. *See* 1 Francis Wharton, A Treatise on the Law of Evidence in Criminal Issues § 262, at 503 & n.14 (10th ed. 1912) (stating that *McPike* "cannot be sustained" and that "[t]he better rule is that when the transaction is over, no matter how short may have been in the interval, and the assailant is absent, declarations by the assailed . . . are not part of the *res gestae*"); *Binns v. State*, 57 Ind. 46, 51 (1877) (same and refusing to follow *McPike*); *Mayes*, 1 So. at 734-35 (same); *Ah Lee*, 60 Cal. at 88-92 (same).[5]

There is little doubt that the *res gestae* doctrine, as reflected in these cases, was shaped by a desire to protect the right to confrontation. Early 19th century treatises explained that "[t]he principle of th[e] rule" rejecting all "hearsay reports of transactions given by persons not produced as witnesses is that such evidence requires credit to be given to a statement made by a person *who is not subject to the ordinary tests* enjoined by law for ascertaining the correctness and completeness of his testimony" – namely, to "oath" and "cross-

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[5] A lone English criminal case also suggested that a statement describing a recently completed incident might be admissible, *see Rex v. Foster*, 6 Car. & P. 325 (1834), but it, too, met with a strong rebuke. *See, e.g.*, 1 Horace Smith, Roscoe's Digest of the Law of Evidence in Criminal Cases 28 (8th Am. ed. 1888) (broad reading of decision is "difficult to reconcile with established principles"). In a subsequent English case, a court made clear that the *res gestae* rule remained strict. There, a victim, no more than one or two minutes after having her throat cut, exclaimed to her aunt (who was just outside the house), "See what Harry has done!" The court ruled the declaration inadmissible. The court explained that "[a]nything uttered by the [victim] at the time the act was being done would be admissible, as, for instance, if she had been heard to say something, as 'Don't, Harry!' But here it was something stated by her after it was all over, whatever it was, and after the act was completed." *Regina v. Bedingfield*, 14 Cox Crim. Cas. 341, 342-45 (Crown Ct. 1879).

examination." 3 Simon Greenleaf, A Treatise on the Law of Evidence §124, at 148 (1842); *see also* 3 William Oldnall Russell, Treatise on Crimes and Misdemeanors 246 (9th ed. 1877) ("the reason of the rule is, that evidence [against the accused] ought to be given under the sanction of oath, and that the person who is to be affected by the evidence may have an opportunity of interrogating the witness as to his means of knowledge, and concerning the particulars of his statement"); 1 Leonard MacNally, The Rules of Evidence on Pleas of the Crown 360 (1811) (hearsay is inadmissible at trials because "such evidence is not upon oath: and also because the party, who would be affected by such evidence, had no opportunity for cross-examination").

In a case holding inadmissible a manslaughter victim's statement identifying the alleged perpetrator moments after being shot, the Vermont Supreme Court made explicit what was implicit in the treatises and in many other opinions of the time:

> The wisdom and justice of this rule in the administration of criminal law must be apparent. The general rule is, that no evidence can be received against the prisoner except such as is taken in his presence. . . . [To] admit the declarations of the party injured, made in the absence of the party accused, and without the right of cross examination, at a period of time so far subsequent to the happening of the act or transaction about which the declarations are made that the party might have invented them, would be depriving the accused of one of the most important safeguards the law has given him for his protection.

Carlton, 48 Vt. at 643-44; *accord Harris v. State*, 1 Tex. Ct. App. 74, 80-81 (1876). True *res gestae* statements, in short, may have been exempt from confrontation requirements, *see*

People v. Simonds, 19 Cal. 275, 278 (1861), but courts were loathe to go any further.

The only recognized exception (aside from dying declarations) to the prohibition against admitting declarations outside of the *res gestae* actually proved the rule that introducing any declaration accusing someone of committing a criminal act implicated the right to confrontation. In cases in which "a person ha[d] in been any way outraged" – most often in rape cases, but also in other cases lacking any sexual component – "the fact that this person made a complaint" right after it happened was admissible. 1 Horace Smith, Roscoe's Digest of the Law of Evidence in Criminal Cases 28 (8th Am. ed. 1888); *see also* 3 Russell, *supra*, at 248-49. Sometimes courts admitted only the fact that the alleged victim complained, and sometimes courts admitted the substance of such complaints to corroborate the victim's trial testimony. *See Rex v. Clarke*, 171 Eng. Rep. 633 (1817) (only fact of complaint admissible); *Regina v. Walker*, 174 Eng. Rep. 266 (1839) (same); *Regina v. Osborne*, 174 Eng. Rep. 622 (1842) (same); 3 Greenleaf, *supra*, at § 213 (corroboration permissible); 3 Russell, *supra*, at 249 (same).

At the same time, it was settled that "*if the victim did not testify*, evidence of the [fresh] complaint" – even to a relative or friend – "was *not* admissible, and only the fact that a complaint was made could be admitted." 2 *McCormick on Evidence* § 272.1, at 223 (4th ed. 1992) (emphasis added); 3 Russell, *supra*, at 249 (same); 3 Greenleaf, *supra*, at § 213 ("The complaint constitutes no part of the *res gestae* . . . and where she is not a witness in the case, it is wholly inadmissible."); Roscoe, *supra*, at 23 (same). Thus, for instance, the King's Bench in 1779 held that an alleged victim's complaint made to her mother "immediately upon coming home" from an alleged assault was inadmissible because the victim was "not sworn or produced as a witness on the trial." *King v. Brasier*, 1 Leach 199, 200 (K.B. 1779). Nearly a century later, an

American court held that an alleged victim's statements that were "elicited . . . by her parents soon after" an alleged assault with intent to commit rape were inadmissible because the declarant did not testify and the statements were "not [made] in the presence of the accused." *Weldon v. State*, 32 Ind. 81, 82 (1869). It is hard to miss the confrontation rhetoric in these decisions. Other decisions also adhered to this restriction on introducing absent victims' fresh complaints, even as they gradually discarded the supposition that victims of certain violent acts typically would complain right after they happened.[6]

2. In light of this history, *Thompson v. Trevanion*'s statement that a woman's declaration "immediat[ely] upon the hurt received" was admissible, 90 Eng. Rep. at 179, shows, if anything, that the Framers would not have exempted a 911 call reporting a crime from the Confrontation Clause. It must be noted, for starters, that English common-law cases illuminate the scope of the right to confrontation only when they admitted or rejected statements offered "against the accused in a *criminal* case." *Crawford*, 541 U.S. at 56 (emphasis in original). *Thompson*, however, as its caption indicates, was a *civil* case – an "action of trespass of assault, battery, and wounding." 90 Eng. Rep. at 179. The judge had no occasion to consider whether the statement at issue would have been admissible against a *criminal* defendant.

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[6] *See Regina v. Guttridges*, 173 Eng. Rep. 916 (1840) (fresh complaint to friend inadmissible because witness was not available to testify); *Regina v. Megson*, 173 Eng. Rep. 894 (1840) (complaint "as soon as [alleged victim] returned home" inadmissible "to show who committed the offence" because she did not testify at trial); *People v. McGee*, 1 Denio 19, 22-24 (N.Y. 1845) (reversing conviction because alleged victim's complaint to housekeeper "immediately after the offense is supposed to have been perpetrated" was improperly admitted in light of fact alleged victim did not testify at trial); *Hornbeck v. State*, 35 Ohio St. 277, 280-81 (1879) (reversing conviction because alleged victim's fresh complaint was introduced without her testifying at trial); *Elmer v. State*, 20 Ariz. 170 (1919) (same).

Furthermore, many Founding-era commentators assumed that the case's four-sentence *nisi prius* report did not intend to suggest that the declarant's statement was admitted to prove that the defendant injured her. One treatise assumed that the declarant's statement simply described her injury and was not accusatory. *See* 3 Russell, *supra,* at 248 & n.1. Another believed that the statement was admitted solely to show she complained but not to prove how it happened. *See* 1 Thomas Starkie, A Practical Treatise on the Law of Evidence, pt. II, § 30, at 149 (1826). Still another assumed that the declarant testified at trial, so that her out-of-court statement was nothing more than corroborative evidence. *See* Geoffrey Gilbert, The Law of Evidence 108 (1754). *See generally Insurance Co. v. Mosley,* 75 U.S. (8 Wall.) 397, 418 (1869) (Clifford, J., dissenting) (*Thompson* is "so imperfectly reported that [it] can hardly be said to be reliable").

But to the extent *Thompson* might nevertheless be thought relevant and to have admitted the declarant's statement in the absence of her testifying to prove how she was injured, the reporter's phrase "immediat[ely] upon the hurt received," 90 Eng. Rep. at 179, is most naturally read to mean that the statement – in contrast to the one here reporting an incident to a third party – was made so simultaneously with being injured that it was part of the *res gestae. See, e.g.,* A Universal Etymological English Dictionary (1783) (defining "immediate" as "[w]hich follows without any thing coming between; that follows or happens presently; that acts without means"); Complete and Universal English Dictionary (1792) ("In such a state with respect to something else, as to have nothing in between; without any thing intervening; not acting by second causes. Instant, or present, as applied to time."). To the extent that advocates and commentators later sometimes suggested that the judge in *Thompson* admitted an absent witness's declaration describing a truly completed act for the truth of the matter asserted, authorities as late as the 1880's believed that following this interpretation of *Thompson* in a criminal case

would have been "difficult to reconcile with established principles." Smith, *supra*, at 28; *see also Mayes*, 1 So. at 734 (refusing to follow this interpretation); *Ah Lee*, 60 Cal. at 89 (same).

It is true that, during the latter part of the 19th century, this Court in a civil case, and then even some state courts in criminal cases, began to "extend" the scope of the *res gestae* doctrine to cover statements made "*almost* contemporaneously with [an injury's] occurrence." *Mosley*, 75 U.S. (8 Wall.) at 408 (emphasis added); *see also Territory v. Callaghan*, 6 P. 49, 54-55 (Utah 1885) (statement a few seconds after shooting); *State v. Robinson*, 27 So. 129, 130-31 (La. 1900) (statement thirty seconds after shooting). But these later-emerging decisions cannot be taken as evidence that the Framers would have believed *the Confrontation Clause* permitted an alleged victim's statement reporting a recently completed crime. The decisions post-date the Founding by roughly a century. Furthermore, the Confrontation Clause does not apply in civil trials, and it did not then apply in state criminal prosecutions.

Most important, these decisions extending the scope of the *res gestae* doctrine rested on the supposition that "[i]n the ordinary concerns of life, no one would doubt the truth of th[e] declarations" made shortly after disruptive events. *Mosley*, 75 U.S. (8 Wall.) at 408; *accord Callaghan*, 6 P. 49, 54 ("No time had elapsed for the fabrication of a story."); *Robinson*, 27 So. at 130 (no opportunity for "fabrication"). While the perceived reliability of untested out-of-court statements afforded a legitimate theoretical basis in cases beyond the reach of the Sixth Amendment to expand the *res gestae* doctrine, "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right to confrontation." *Crawford*, 541 U.S. at 61. In particular, the Framers believed that when the government seeks to introduce testimonial evidence in a criminal case, "the only indicium of reliability sufficient to satisfy constitutional demands is the one the

Constitution actually prescribes: confrontation." *Id.* at 68-69. The overwhelming body of criminal jurisprudence for roughly 100 years after the Founding thus, quite properly, treated statements reporting completed criminal acts as testimonial evidence, regardless of any perceived reliability. *See, e.g., Mayes,* 1 So. at 735; *Carlton,* 48 Vt. at 643.

3. By the same token – and contrary to the Washington Supreme Court's suggestion, J.A. 125 – it is of no moment that McCottry's answers to the 911 operator's questions in this case qualified as "excited utterances" under current Washington evidence law. Washington courts openly have acknowledged that the State's modern excited utterance rule "is not as restrictive as the requirements of the common law [*res gestae*] exception." *State v. Dixon,* 684 P.2d 725, 728 (Wash. App. 1984). And *Crawford* made clear that statements bearing testimonial attributes that, at the same time, "happen to fall within some broad, modern hearsay exception" still implicate the Confrontation Clause, "even if that exception might be justifiable in other circumstances." 541 U.S. at 56 n.7. That is precisely the case with the excited utterance exception.

The "excited utterance" exception did not really exist until 1904. That was when Dean Wigmore, r eviewing the spattering of cases such as *Mosley* from late 1800's, realized that these cases could not really be explained by the common-law *res gestae* doctrine. 3 John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law §§ 1745-47, at 2247-50 & § 1796, at 2320. But instead of rejecting these cases as strays, Wigmore claimed they were comparable to *Thompson* and he advanced, for the first time, the notion that the "stress of nervous excitement . . . stills the reflective facilities" and renders statements under that condition "particularly trustworthy," thereby warranting exemption from the hearsay rule. 3 *id.* § 1747, at 2250; *see also* Friedman & McCormack, 150 U. Pa. L. Rev. at 1217-22 (describing Wigmore's role in creating this hearsay exception and

referencing authority explaining that Wigmore's psychological presumptions are open to serious question). Equally important, Wigmore did not distinguish between civil and criminal cases in advancing this new reliability-based theory.

Wigmore openly acknowledged that, in contrast to classic *res gestae* statements, narrative statements describing actions that had just completed were "testimonial," as he used that term. 3 Wigmore, *supra*, § 1746, at 2248-49; *see also id.* § 1796, at 2320 ("what [courts] do in this instance is to admit extrajudicial assertions *as testimony* to the fact asserted") (emphasis added).[7] But even when such statements reported criminal acts to governmental agents, Wigmore did not perceive this as posing Confrontation Clause concerns in ensuing criminal prosecutions. He thought the Clause did "not prescribe what kinds of testimonial statements . . . shall be given infrajudicially – this depend[ed]," in his view,

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[7] Wigmore further explained:

> Whenever, therefore, an [excited] utterance is used as testimony that the fact asserted in it did occur as asserted, *i.e.*, on the credit of the speaker as a credible person, it is being used testimonially, and is within the [general] prohibition of the Hearsay rule.
>
> Now this testimonial use is precisely the use that is made of the present class of statements. . . . [T]hey clearly do involve the testimonial use of the assertion to prove the truth of the fact asserted, – for example, *when the injured person declares who assaulted him* or whether the locomotive bell was rung, or when the bystander at an affray exclaims that the defendant shot first. Such statements are genuine instances of using a hearsay assertion testimonially; *i.e.*, we believe that Doe shot the pistol, or that the bell was rung, *because* the declarant so asserts – which is essentially the feature of all human testimony.

3 Wigmore, *supra*, at §1746, at 2249 (first emphasis added).

exclusively "on the law of evidence for the time being." 2 *id.* § 1397, at 1755. Wigmore's perspective, in other words, gave states open field running to create expansive excited utterance exceptions for use in prosecuting criminal cases. And many states took it.[8]

Crawford, however, expressly rejected Wigmore's constitutional view. 541 U.S. at 50-51, 67-68. *Crawford* held that the Confrontation Clause does not depend on "the vagaries of the rules of evidence, much less [on] amorphous notions of 'reliability.'" *Id.* at 61. Instead, it demands of *all* testimonial statements "what the common law required." *Id.* at 68.

The common law, in criminal cases, precluded courts from admitting a victim's description of a completed criminal act to a governmental agent in the absence of the government proving unavailability and that there was a prior opportunity to cross-examine. Consequently, so does the Confrontation Clause today.

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[8] In recent years, Washington and other states aggressively exploited this opening that Wigmore – and, in a slightly different way, the *Roberts* framework – gave them. Washington courts have held that alleged victims' statements made several hours after upsetting incidents can constitute excited utterances, even if made in response to governmental agents' questions. *See State v. Thomas*, 83 P.3d 970, 987 (Wash. 2004) (collecting examples); *State v. Williamson*, 996 P.2d 1097, 1102-03 (Wash. App. 2000) (victim's statements at police station after being promised suspect would be arrested constituted excited utterances); *State v. Morrison*, 1999 WL 429806 (Wash. App. 1999) (unpublished opinion) (statements in interview with police officer four to five hours after incident were excited utterances). Many other states in modern times have developed similarly broad excited utterance rules. *See, e.g., Spence v. State*, 162 S.W.3d 877, 881 (Tex. App. 2005) ("Texas courts have held that a declarant's state of excitement can last long after the initial crime and that excited utterances can be made both spontaneously or in response to questioning."); *People v. Brown*, 517 N.E.2d 515, 517-522 (N.Y. 1987) (same in New York and other jurisdictions). Not all states, however, have taken this approach; at least one has carefully cabined its excited utterance exception to avoid treading on confrontation concerns. *See State v. Branch*, 865 A.2d 673 (N.J. 2005).

II. There Is No Reason In The Context Of 911 Calls To Depart From The Traditional Rule That Accusatory Statements Made To Governmental Agents Implicate The Confrontation Clause.

To the extent that the text of the Sixth Amendment and the historical record do not alone resolve this case, a straightforward application of *Crawford* confirms that a modern-day statement reporting a criminal act to a governmental agent – just like such a report during the Founding era – is subject to the Confrontation Clause. That means that a statement, as here, that an alleged victim makes to a 911 operator accusing someone of just having committed a crime is testimonial.

A. Prosecuting A Case Using A 911 Call That Reports A Crime, Instead Of The Accuser's Live Testimony, Unacceptably Undermines The Adversarial Process.

Crawford's testimonial principle re-installs the Confrontation Clause's fundamental commitment, as Justice Thomas put it years earlier, to the "adversary process." *White*, 502 U.S. at 365 (Thomas, J., concurring in part and concurring in the judgment); *see also Crawford*, 541 U.S. at 42-52. It requires that the Clause be interpreted at all times with its original focus in mind – namely, prohibiting the use of "[out-of-court accusations," *Bruton*, 391 U.S. at 138 (Stewart, J., concurring), or "*ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50. Accordingly, this Court held in *Crawford* that "[w]hatever else the [testimonial principle] covers, it applies at a minimum to prior testimony . . . and to police interrogations" – that is, to "recorded statement[s] knowingly given in response to structured police questioning." *Id.* at 53 n.4, 68. This Court also noted that the accusatory "spontaneous declarations" the victim made to the responding officer in *White*, some forty-five minutes after the sexual assault at issue, were "testimonial." *Id.* at 58 n.8.

The practice of trying a defendant based on answers an alleged victim gives to a 911 operator's questions likewise is antithetical to the adversarial process the testimonial principle is designed to protect. The 911 service provider in this case describes its interactions with alleged victims as "police incident interviews," J.A. 112, and rightfully so: Operators, as agents of the State, carry out such interviews not only for the purpose of facilitating responses to any needs for assistance but also to begin gathering information that may be useful in the police's investigating and the State's prosecuting criminal cases. That is at least partly why 911 systems record their interviews. That is also why the 911 system here, as elsewhere, uses "a uniform method of interviewing callers requesting police assistance." J.A. 112; *see also, e.g., People v. Cortes*, 781 N.Y.S.2d 401, 406 (N.Y. Sup. Ct. 2004). This policy requires operators to ask numerous detailed questions – such as "[w]hat circumstances led to the incident?" and "what is the suspect's date of birth?" – that have as much or more to do with gathering evidence for potential investigations and prosecutions as they do with attempting to resolve any existing public safety problem. J.A. 113-16.

The operator here "followed [the scripted guidelines] almost exactly." J.A. 135 n.5 (Sanders, J., dissenting). She elicited, through five separate questions, what the Washington Supreme Court called "*the information essential to the prosecution of this case*[,] McCottry's initial identification of Davis as her assailant." J.A. 128 (emphasis added); *see also* J.A. 9 (transcript of questioning).

When a governmental agent engages in such "structured" preliminary inquiries with an eye toward potential law enforcement action, the Confrontation Clause's traditional concerns respecting the inadequacies of *ex parte* examinations come squarely into play. *Crawford*, 541 U.S. at 53 n.4; *see also Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (plurality opinion) ("When the government is involved in the statements'

production and when the statements describe past events," the statements "implicate the core concerns of the old *ex parte* affidavit practice."). It makes no matter whether such preliminary *ex parte* dialogue takes place (as at common law) at a constable's house or (nowadays, with the assistance of modern technology) immediately over the phone. Indeed, the capacity in modern times to record these phone conversations on a tape or disk actually heightens the threat to the adversarial process. It enabled the prosecutor here, upon playing the 911 tape for the jury, to say that proof that McCottry was assaulted was "right here in her voice," J.A. 81, lending a nearness to her out-of-court declarations – and a resemblance to in-court testimony – that would be absent if a third person had simply recounted the police incident interview on the witness stand.

What is more, just as in *Crawford,* the transcript of the recorded statements here reveals several assumptions concerning the defendant's guilt "that cross-examination might well have undermined." 541 U.S. at 66. McCottry stated at one point that another man had been present in the house, J.A. 10, and she later told the police she had been involved an argument with this man preceding the alleged assault. J.A. 136 n.7 (Sanders, J., dissenting). But the operator never pursued whether this man might have been the one who actually assaulted her. (Nor did the police; they never even sought to learn his last name. *Id.*; *see also* Report of Proceedings (Sept. 4, 2001), at 18, 23-24). At another point, a child came on the phone call and said "Hi Daddy," thus assuming it was Davis who was on the other end of the line. J.A. 11. Again, the operator never followed up to ask why McCottry's child would have thought that a man who supposedly had just left the house after assaulting his mother was on the phone with her.

Whatever the outer boundaries of the testimonial principle may be, this type of one-sided dialogue is more than sufficient to trigger confrontation concerns. To hold otherwise would be to say that the government may establish a system for

reporting crimes to the police and for conducting *ex parte* interviews of complainants, and then use recordings of those "police incident interviews," as a substitute for live testimony at trial, to prosecute defendants. The government could proceed in this manner even when the complainants are perfectly available for trial. *See Crawford,* 541 U.S. at 68 (no unavailability requirement for nontestimonial hearsay); *White,* 502 U.S. at 355-58 (Confrontation Clause imposes no unavailability requirement for introducing excited utterances); Fed. R. Evid. 803(2) (unavailability not required under excited utterance exception); Wash. R. Evid. 803(a)(2) (same). If modern prosecutors could try and convict defendants based solely on such "excited utterance" interviews, the right to confrontation would be disabled from serving its fundamental objective: requiring accusations of criminal conduct to be leveled in court proceedings, subject to adversarial testing.

This is especially so in the context of domestic violence reports like the one here. Washington's Domestic Violence Prevention Act, enacted in 1984, *requires* the police to arrest anyone that they have probable cause to believe has "violated a protection order" or who recently has committed "a domestic violence crime." *City of Tacoma v. State,* 117 Wn.2d 348, 352 (1991); *see* Wash. Rev. Code § 26.50.110(2) (protection order violation); Wash. Rev. Code § 10.31.100(2) (domestic violence). Lest these laws go unnoticed, the websites that the Washington court system and King County (where this case arises) maintain regarding domestic violence publicize these procedures to would-be complainants.[9] Consequently,

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[9] *See* Washington Courts, *Domestic Violence Protection Order Process, Violation of Protection Orders, What You Should Do If the Order is Violated,* <http://www.courts.wa.gov/dv/?fa=dv_order.ordviol> (last visited Dec. 21, 2005) ("When you believe a violation of the terms of the protection order has occurred, you should call 911 or your local police to request an officer for any needed emergency assistance and to take a report of the violation." Violating a protection order is a crime that "subjects the Respondent to a MANDATORY ARREST."); King County, *Information*

"[p]eople know now that if they call 911 and report domestic violence there will probably be an arrest. Indeed, 'under mandatory arrest laws, a battered woman's call to the police is tantamount to a request for arrest.'" Friedman & McCormack, 150 U. Pa. L. Rev. at 1196 (quoting *Developments in the Law – Legal Responses to Domestic Violence,* 106 Harv. L. Rev. 1498, 1538 (1993)). Certainly Michele McCottry was reasonably on notice that her call would trigger such action; she told the operator she had a protection order against Davis and that the police had responded to another domestic disturbance at her house only two days earlier. J.A. 12, 21; *see also* J.A. 134 (Sanders J., dissenting) (McCottry was on notice regarding "the criminal penalties for violating the [protection] order"); J.A. 3 (actual protection order). To say that McCottry was not Davis' accuser – or, as the Sixth Amendment says, a "witness against" him – would be to drain the concept of any meaning.

B. That People Sometimes Call 911 At Least In Part To Seek Help Does Not Render The Accusatory Statements Here Nontestimonial.

Notwithstanding the abundant indicators that the right to confrontation should have applied here, the Washington Supreme Court held that McCottry's accusation to the 911 operator was not testimonial because McCottry supposedly called 911 "because of an immediate danger" rather than to

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About the Law Against Domestic Violence and About Courts and the Protection Order Process, <http://www.metrokc.gov/dvinfo/dv6_0.htm> (last visited Dec. 21, 2005) ("Once you have a valid Order for Protection, if it is violated, you should call 9-1-1 and ask the police to help you by enforcing it."); King County, *If You Think You Are or Might Be a Victim of Domestic Violence*, < http://www.metrokc.gov/dvinfo/dv1_0.htm> (last visited Dec. 21, 2005) ("If the police believe they have probable cause to suspect that a person assaulted you within the previous four-hour period, they are required to arrest the person who committed the assault. That is the law.").

"'bear witness' in contemplation of legal proceedings." J.A. 128. This analysis is wrong on the law and wrong on the facts.

1. As a legal matter, any subjective purpose that McCottry may have had in calling 911 is irrelevant here. There is no historical or modern justification for assessing a declarant's subjective state of mind to determine whether her statement accusing someone of committing a crime is testimonial. Hues and cries to 18th century English and American constables were inadmissible regardless of the accuser's subjective intent. *See supra* at 18-21. The same was true with respect to victims' exclamations in the 19th century that someone had just shot or stabbed them. Even though such victims were seriously injured and many may not have been trying to "bear witness," the only question relevant to courts was a functional one: whether the declarant was describing a completed criminal act. *See supra* at 24-29.

What is more, the Washington Supreme Court's rule dividing 911 statements seeking help from danger from those seeking to "'bear witness' in contemplation of legal proceedings," J.A. 128; *see also id.* at 124, sets up a demonstrably false dichotomy. The truth is that almost all 911 calls contain an element of each. Even if the typical caller wants some kind of help, she also probably realizes she is making statements that might reasonably serve prosecutorial purposes. Pretending, as the Washington Supreme Court did, that the spectrum of 911 calls – and the spectrum of statements within such calls – can be neatly divided between those that seek to get help and those that seek to create evidence triggering prosecutorial action invites judicial manipulation and idiosyncratic decision making – the very problems that plagued the *Roberts* framework. *See Crawford*, 541 U.S. at 62-63; *People v. Walker*, 697 N.W.2d 159, 170 (Mich. App. 2005) (Cooper, J., dissenting) ("Determining whether a statement is testimonial in nature based on the declarant's state of mind is

as amorphous as the reliability test of *Ohio v. Roberts*"; indeed, "it is merely a reliability analysis in disguise.").

To the extent that historical traditions and inferences do not resolve whether a type of statement is testimonial and it thus becomes necessary to look to a more general standard, a court should inquire whether a *reasonable declarant* would have *anticipated* that her statement might be used for law enforcement purposes. In countless areas of constitutional criminal procedure, this Court shuns subjective inquiries in favor of objective standards. *See, e.g., Berkemer v. McCarty,* 468 U.S. 420, 430-31, 442 & n.35 (1984) ("in custody" requirement for Fifth Amendment's *Miranda* rule); *Rhode Island v. Innis,* 446 U.S. 291 (1980) ("interrogation" standard for Fifth Amendment's *Miranda* rule); *Florida v. Bostick,* 501 U.S. 429, 437 (1991) ("seizure" standard under Fourth Amendment). The reasons for favoring objective standards – efficiency, certainty, and consistency – apply, if anything, with more force here. The very reason confrontation issues arise in the first place is because certain witnesses are not present to testify. The idea, therefore, that courts should estimate those witnesses' "perception[s] of [their] situation[s]" at the time they gave their out-of-court statements ignores a fundamental teaching of *Crawford* – that "[o]nly cross-examination could reveal [those perceptions]." *Crawford,* 541 U.S. at 66.

Furthermore, focusing on whether a reasonable person – had she stopped to consider the matter – would have realized she was making a statement that might be used prosecutorially adheres to the Framers' intention of preserving the adversarial process. This test triggers the Confrontation Clause when an out-of-court statement, if later used at trial, would operate as the functional equivalent of *ex parte* prosecutorial testimony. It likewise corresponds to the Fifth Amendment rule that persons act as "witness[es]," against themselves, U.S. Const. amend. V – and thus give "testimonial" evidence – when they make "disclosures" that they "reasonably believe[] could be

used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States,* 406 U.S. 441, 445 (1972); *see also Doe v. United States,* 487 U.S. 201, 210-11 (1988) (further refining "testimonial" concept in Fifth Amendment context). And while this test appropriately excludes "a casual remark to an acquaintance," *Crawford,* 541 U.S. at 51, or a statement in furtherance of a conspiracy "made unwittingly to an [FBI] informant," *id.* at 58 (citing *Bourjaily v. United States,* 483 U.S. 171, 181-84 (1987)), it unquestionably includes McCottry's statement here.

2. To be sure, people sometimes call 911 and do nothing more than ask for help. When a caller does so, that part of a call may not be testimonial. Similarly, a court might legitimately allow the government in prosecuting a crime to introduce the plain *fact* that an alleged victim called 911 shortly after the alleged incident. But if the caller does not testify at trial, the fact that the alleged victim made a call is the most that should be admissible; portions of 911 calls reporting crimes and identifying alleged perpetrators are testimonial and cannot be used in place of the accuser's live trial testimony.

The 911 police incident interview here plainly falls on the testimonial side of this framework. Instead of starting the call with a plea for urgent safety measures, McCottry responded from the beginning to a series of questions posed by the operator (giving, for starters, Davis' last, then first, and then middle name), and she later expressly stated that she did *not* need an "aid car." J.A. 10. Indeed, upon learning that McCottry was not asking for help, the operator nevertheless pressed on and insisted that McCottry "stop talking and answer my questions." *Id.* Finally, McCottry's statements "describe[d] past events," *Lilly,* 527 U.S. at 137 (plurality opinion); her alleged attacker "had left the residence moments" before she spoke to the 911 operator. J.A. 117.

Any lingering doubt concerning whether the 911 police incident interview here was testimonial is eliminated by the prosecutor's own characterization of the interview upon playing the tape recording for the jury. The prosecutor asserted that "although [the accuser] is not here today to talk to you she left you something better. She left you *her testimony* on the day that this happened . . . this shows that the defendant, Adrian Davis was at her home and assaulted her." J.A. 81 (emphasis added). This forthright description of the way that this 911 interview was used in this case – made before the *Crawford* decision created an incentive for the State to downplay the testimonial nature of out-of-court statements – obviously is accurate. The State did not use McCottry's statements to argue that she called for help; it used them as substantive evidence to prove element by element that Davis assaulted her. J.A. at 68-70, 81-82. Consequently, the State's introduction of the 911 call violated the Confrontation Clause.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Washington Supreme Court.

Respectfully submitted,

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